(1)

89-1964

In The

Supreme Court of the United States

October Term, 1989

MENATSAGAN MELIKIAN

Petitioners

vs.

CORRADETTI, et al

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MENATSAGAN MELIKIAN, *pro se*
AND
KAMBIZ AFTASSI
PETITIONERS
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QUESTION PRESENTED

Whether it is legally permissible that the district court judge fully aware that his integrity and impartiality of basic findings of fact and law are effectively impugned and established as false and fictitious by the initial reviewing panel of the appellate court, to continue illegally sitting on the case on remand in disregard of the language of the statutory mandate under 28 U.S.C. § 455 (a) that requires the self-disqualification of the district judge. (Appendix A) - *Melikian vs. Corradetti,* 791 F.2d 274 (3rd Cir. 1986.)

PARTIES

The parties hereto are the same parties as in the proceedings in the United States District Court for the District of New Jersey, (No. 84-3480), and on appeal to the United States Court of Appeals for the Third Circuit, (Nos. 85-5370 and 89-5588). Menatsagan Melikian and Kambiz Aftassi are the petitioners herein and Anthony Corradetti, et al, and Honorable Stanley S. Brotman, U.S.D.J. are the respondents and will be referred to as "Melikian" and "Corradetti" throughout this petition.

APPENDIX

No.

In The

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MELIKIAN,

Petitioners

vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

The first and only opinion of the Court of Appeals dated May 28, 1986, is reported at *Melikian v. Corradetti*, 791 F. 2d 274 (3rd Cir. 1986) and is attached as Appendix A.

STATEMENT OF JURISDICTION

The Judgment Order of the Third Circuit Court of Appeals was made and entered on December 21, 1989. (Appendix B). A petition for rehearing and rehearing in Banc was filed on January 2, 1990. Rehearing was denied by Order of the Third Circuit dated January 24, 1990. (Appendix C). An application for an extension of time within which to file a petition for a writ of certiorari was presented to Justice Brennan, who on April 13, 1990, signed an order extending the time to and including June 8, 1990. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 455:

(a) Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

* * * * *

(e) Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

STATEMENT OF THE CASE

In April, 1982, Menatsagan Melikian and Kambiz Aftassi ("plaintiffs") secured a jury verdict in their favor against Anthony Exporting Company ("Exporting") in the United States District Court for the District of New Jersey, by special interrogatory for the breach of the corn contract for compensatory damages, and were awarded compensatory damages totalling $1,128,000 but no punitive damages. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332 (a)(2).

Due to Exporting's insolvency, plaintiffs filed a second suit on four counts in the same court against the principals of Exporting and their related parties as named on page ii of this petition. All defendants moved to dismiss plaintiffs' second action under Fed. R. Civ. P. 12 (b)(6). Upon granting of these motions by the district court plaintiffs appealed.

The district court dismissed the Fraud, count one, on basis of Collateral Estoppel and Entire Controversy Doctrine. The reviewing appellate panel rejected the district judge's arguments finding that nothing existed on the record to support the district judge's allegations. The court stated:

> Accordingly, we hold that the district court erred in dismissing count one claims against Corradetti, Coppersmith and Bernstein.

Similarly, the appellate court reinstated counts two, three and four. The Court of Appeals for the Third Circuit reversed the judgment below and remanded the case.

Accordingly, it became the statutory obligation of the district judge to recuse himself on his own motion under the provisions of 28 U.S.C. § 455 (a).

SUMMARY OF ARGUMENT

The district judge ignored his obligation to recuse from the case as required by the statute. Although Melikian was under absolutely no duty to seek disqualification nonetheless Melikian moved for the district judge's recusal. The district judge refused and resorted instead to manipulations and various devious practices to create false issues to evade judicial review of the fact that the judge was without jurisdiction continuing to sit pursuant to the remand of the case. Finally, the district judge whose integrity and impartiality have been impugned by the first appellate panel rendered an inappropriate judgment against Melikian. Accordingly, the

petition should be granted to prevent manifest miscarriage of justice. This issue also has an important impact on the public policy and perception.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE DISTRICT COURT JUDGE ABUSED HIS DISCRETION CONTINUING SITTING ON THE CASE ON REVERSAL AND REMAND PURSUANT TO THE PUBLISHED OPINION OF THE COURT OF APPEALS AS EXPRESSED BY THE INITIAL PANEL WHERE THE DISTRICT COURT JUDGE WAS WITHOUT AUTHORITY TO RENDER ANY JUDGMENT. (APPENDIX A.)

At the outset, the court of appeals rulings are the law of the case, and the district court is bound to follow them; it has no jurisdiction to review or alter them.

On August 24, 1989, Melikian appealed the district court's judgment. A second three judge panel affirmed the judgment of the court and on December 21, 1989, entered a Judgment Order against Melikian under Rule 12 (6). (Appendix B). Melikian petitioned for Rehearing and Rehearing in Banc. It was denied on January 24, 1990. (Appendix C). This Petition for a Writ of Certiorari follows.

The second appellate panel erred in affirming the district judge's action by a Judgment Order. The outcome of the appeal here is clearly controlled by the initial decision of the Court of Appeals (Appendix A). A published Opinion of the Court of Appeals as expressed by the initial panel, as here, may not be overruled without the approval of a majority of the Court.

The second appellate panel's erroneous contrary decision is based on its willingness to overlook the points of law and fact in its desire to eliminate the appeal by application of Rule 12 (6) without oral argument. Nonetheless, for affirmance of the district court in this case a fuller explanation of the panel's action is needed than the mere affirmance by a Judgment Order.

CONCLUSION

Based upon all the foregoing, petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

MENATSAGAN MELIKIAN, pro se
KAMBIZ AFTASSI
Petitioners

MENATSAGAN MELIKIAN, pro se
On the Petition

Dated: June 4, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-5370

MENATSAGAN MELIKIAN and
KAMBIZ AFTASSI,

Appellants

vs.

ANTHONY CORRADETTI; MORRIS COPPERSMITH; RUBIN BERNSTEIN; BERNARD WEINSTEIN; as individuals and in their corporate capacities, individually, jointly, severally and in the alternative and CORRADETTI ENTERPRISES, INC., t/a ANTHONY SALES, a New Jersey corporation; ANTHONY ASSOCIATES, INC., a New Jersey corporation; R.A.M. PACKAGING, a New Jersey Fictitious Name; MEMCO TRADING CO., INC., a Pennsylvania Corporation authorized to do business in New Jersey; PHILBER SALES CORPORATION, t/a BERNIE WEINSTEIN, a New Jersey Corporation, and ANTHONY EXPORTING CO., INC., jointly and severally

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Appeal from the United States District Court
for the District of New Jersey - Camden
(Civil Action No. 84-3480)

Argued February 12, 1986

BEFORE: HIGGINBOTHAM and STAPLETON,
Circuit Judges and
TEITELBAUM, *District Judge**

(Filed MAY 28, 1986)

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* Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

I.

In 1982, Menatsagan Melikian and Kambiz Aftassi ("plaintiffs") instituted an action against Anthony Exporting Company ("Exporting") in the United States District Court for the District of New Jersey. Jurisdiction was based on diversity of citizenship. The complaint alleged causes of action for the breach of large contracts for the sale of barley, rice, chickens, and corn by Exporting and requested compensatory and punitive damages. The alleged sales price of the corn contract alone was $44,000,000. The district court dismissed all but the corn contract claim. The jury returned a verdict by special interrogatory in favor of plaintiffs for breach of this contract and awarded them compensatory damages totalling $1,128,000 but no punitive damages.

Due to Exporting's insolvency, plaintiffs have been unable to satisfy their judgment. After the district court denied plaintiffs' post-judgment motion to amend their original complaint and add as defendants the principals of Exporting, plaintiffs filed this second suit in the same court. Named as defendants are Anthony Corradetti; Morris Coppersmith; Rubin Bernstein; Bernard Weinstein; Corradetti Enterprises, Inc., trading as Anthony Sales; Anthony Associates, Inc.; R.A.M. Packaging; Memco Trading Company, Inc.; Philber Sales Corporation trading as Bernie Weinstein; and Exporting.

Plaintiffs' amended complaint asserts in count one claims based upon alleged fraudulent misrepresentation of the financial condition of

Exporting, fraudulent concealment of the true financial condition of that company, and fraudulent inducement to contract. Count two seeks to pierce the corporate veil of Exporting and to hold Anthony Corradetti, Morris Coppersmith, Rubin Bernstein, Anthony Associates, Inc., R.A.M. Packaging Partnership, Memco Trading Company, Inc., and Corradetti Enterprises liable on the judgment obtained against Exporting as the "alter egos" of that corporation. In count three, plaintiffs allege that Anthony Corradetti, Morris Coppersmith, Rubin Bernstein, and Bernard Weinstein conspired, using a variety of business entities, "to set up a sham and shell corporation as a 'conduit of funds' to take unjust and unfair advantage of the enormous potential in the export field for their type of 'scam.'"

All defendants moved to dismiss plaintiffs second action under Fed. R. Civ. P. 12(b)(6). Upon the granting of these motions by the district court, plaintiffs filed this appeal. We reverse.

II.

A. *STANDARD OF REVIEW*

On defendants motion to dismiss the complaint for failure to state a claim upon which relief may be granted, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to plaintiffs. Therefore, we may affirm the district court only if we agree that it is beyond doubt that the plaintiffs can prove no facts in support of their claims that would entitle them to relief. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 444 (3d Cir. 1977), *cert. denied* 434 U.S. 1086 (1978).

As this suit is based on the diversity jurisdiction of the federal courts, the relevant law is that of the forum -- New Jersey. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

B. *THE FRAUD CLAIMS*

Plaintiffs' first count alleges that Corradetti, Coppersmith, and Bernstein, officers of Exporting, fraudulently induced the corn contract between plaintiffs and Exporting by misrepresenting, during the course of contract negotiations, the financial condition of the company and by breaching their duty to disclose the company's true financial condition. More specifically, plaintiffs allege that these men, acting in the name of Exporting on July 2 and 9, 1980, misrepresented to plaintiffs that Exporting had the ability to post a substantial three percent performance bond and to obtain a five percent bank guarantee in connection with the proposed $44,000,000 corn sale. In addition, plaintiffs allege that during this same time period, Corradetti, Coppersmith and Bernstein had a duty, arising from their association with Exporting and a principal-agent relationship between Exporting and plaintiffs, to disclose Exporting's true financial condition to plaintiffs. Because of this affirmative duty, the failure to disclose the true state of Exporting's finances is alleged to constitute fraudulent concealment of a material fact.

1. *Collateral Estoppel*

The district court dismissed count one on the basis of collateral estoppel, finding that the plaintiffs had "fully and fairly litigated the issue of fraud in the inducement of contract in their first action."

Collateral estoppel precludes the relitigation of an issue that has been put in issue and directly determined adversely to the party against whom the estoppel is asserted. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 876 (3d Cir. 1981); *State v. Gonzalez*, 75 N.J. 181, 380 A.2d 1128, 1131 (1977); *Eatough v. Board of*

Medical Examiners, 191 N.J. Super. 166, 465 A.2d 934, 938 (App. Div. 1983). However, the bar of collateral estoppel does not extend to "'any matter which came collaterally in question, ... nor any matter to be inferred by argument from the judgment.'" *Allesandra v. Gross*, 187 N.J. Super. 96, 453 A.2d 904 (App. Div. 1982) (citations omitted). Thus, the factual issue must actually have been litigated and determined. *Id.*

If a party is precluded from relitigating an issue with an opposing party, he is also precluded from doing so with another person unless he lacked a full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue. *United Rental Equipment Co. v. Aetna Life & Casualty Insurance Co.*, 74 N.J. 92, 376 A.2d 1183, 1188 (1977); *Feniello v. University of Pennsylvania Hospital*, 558 F. Supp. 1365, 1367 (D.N.J. 1983). Therefore, since no special circumstances are here cited, if collateral estoppel applies, plaintiffs are estopped from relitigating the precluded issues against other parties as well as against Exporting.

The district court found that plaintiffs' first complaint had "asserted a fraud claim," and that "plaintiffs [had] identified fraud in the inducement as an integral and essential part of their case" in the final pre-trial order.

We agree that the plaintiffs, in their first suit, referred to the same incidents that form the basis of their fraud claim in this second lawsuit. Nonetheless, plaintiffs' first complaint did not raise claims of pre-contract misrepresentation or fraudulent inducement of contract. It relied solely on events following the alleged formation of the corn contract on July 17th to establish Exporting's liability. Count five of that complaint, which requested punitive damages,

alleged "intentional and willful conduct of defendants in causing the above breach of contract," but did not refer to fraud in the *inducement* of the contract. Similarly, the references to fraud and misrepresentation in the pre-trial order, in context, relate exclusively to conduct following July 17th and to plaintiffs' punitive damage claim.

While the trial judge did discuss the law of misrepresentation in his charge to the jury, the case was presented to the jury as a breach of contract case. The jury was asked to consider the fraud issue only in the context of deciding whether to award plaintiffs punitive damages for Exporting's breach of contract. Accordingly, the special interrogatories and the jury's responses do not refer to fraud in the inducement of the corn contract.[1]

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1 The special interrogatories answered by the jury in the first case read in their entirety as follows:

SPECIAL INTERROGATORIES

1. As of July 17, 1980, did defendant Anthony Exporting Co., Inc., agree to all the essential terms of the contract alleged by plaintiffs, Menatsagan Melikian and Kambiz Aftassi?

Yes
Yes No

(If your answer is "No," you should proceed no further, and request the Marshal to return you to the courtroom as your verdict will be in favor of defendant Anthony Exporting Co., Inc. If your answer is "Yes," proceed to answer interrogatory No. 2).

2. Did defendant Anthony Exporting Co., Inc., breach the agreement to which reference is made in interrogatory No. 1?

Yes.
Yes No

Thus, the prior judgment involved a determination only that the *breach* of the contract was not willful or malicious. This judgment therefore does not estop plaintiffs from contending that the individual defendants fraudulently misrepresented Exporting's financial condition before the contract came into existence.

(If your answer is "No," you should proceed no further, and request the Marshal to return you to the courtroom as your verdict will be in favor of defendant Anthony Exporting Co., Inc. If your answer is "Yes," proceed to answer interrogatory No. 3).

3. Specify what, if any, monetary damage do you find that the plaintiffs, Menatsagan Melikian and Kambiz Aftassi, suffered as a result of that breach.

Bid Bond on corn:	$ 378.000
Commission on corn sale to GTC:	$ 600.000
Commission on corn sale to private sector:	$ 150.000
	$1.128.000

(Proceed to interrogatory No. 4).

4. Were defendant's actions wilful and malicious and done solely for the purpose of harming plaintiffs, Menatsagan Melikian and Kambiz Aftassi?

Yes	*No*
	No

(If your answer is "No," you should proceed no further, and request the Marshal to return you to the courtroom as you will have found no basis for assessment of punitive damages. If your answer is "Yes," proceed to answer interrogatory No. 5).

5. What, if any, punitive damages do you determine should be awarded to plaintiffs, Menatsagan Melikian and Kambiz Aftassi?

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This does not mean, however, that issue preclusion will play no role in this case on remand. Plaintiffs will be collaterally estopped from relitigating issues that were actually litigated and decided in the prior action. *See United Rental Equipment Co., supra*, 376 A.2d at 1188. To the extent, for example, that the applicable principles of the law of damages provide for recovery of the same items of loss which the jury evaluated in the first action, plaintiffs will be precluded from contending that their losses exceed the amounts set forth in Special Interrogatory number three. *See Restatement (Second) of Judgments* § 51(2) (1982), *cited with approval in McFadden v. Turner*, 159 N.J. Super. 360, 388 A.2d 244, 247 (App. Div. 1978) (cited as *Restatement (Second) of Judgments* (Tent. Draft 4) § 99).

2. *Entire Controversy Doctrine*

New Jersey has adopted a broad policy against claim-splitting -- the entire controversy doctrine -- that is closely related to principles of res judicata. *Gareeb v. Weinstein*, 161 N.J. Super. 1, 390 A.2d 706, 710 (App. Div. 1978); *see* Comment, *The Entire Controversy Doctrine: A Novel Approach to Judicial Efficiency*, 12 Seton Hall L. Rev. 260, 265 (1982). The district court relied on this doctrine as well as on issue preclusion in dismissing plaintiffs' complaint. It concluded that plaintiffs' pre-contract misrepresentation claims were barred because they had not been brought with the breach of contract claim that was part of the same controversy.

The entire controversy doctrine requires that a person assert in one action all related claims against a particular adversary or be precluded from bringing a second action based on the omitted claims against that party. *Aetna Insurance Co. v. Gilchrist Brothers, Inc.*, 85 N.J. 550, 428 A.2d 1254 (1981). This reflects New

Jersey's view that the "entire controversy, rather than its constituent causes of action, is the unit of litigation. A plaintiff must seek complete vindication of the wrong he charged." *Malaker Corp. Stockholders Protective Committee v. First Jersey National Bank*, 163 N.J. Super. 463, 395 A.2d 222, 238 (App. Div. 1978), *certif. denied* 79 N.J. 488, 401 A.2d 243 (1979).

The entire controversy doctrine reaches more broadly than the "same cause of action" requirement of traditional res judicata doctrine. It is similar to the transaction-based doctrine of claim preclusion described by the Restatement (Second) of Judgments § 24 (1982).[2] *See Gareeb*, 390 A.2d at 710; Comment, *supra*, 12 Seton Hall L. Rev. at 274 n. 117, 288. In determining the dimensions of a single controversy, a court must utilize litigation efficiency as its guide:

> [If] the litigants in the action as framed will, after final judgment therein is entered, be likely to have to engage in additional litigation in order to conclusively dispose of their respective bundles of rights and liabilities which derive from a single transaction or related series of transactions, then the omitted component must be regarded as

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2 Restatement (Second) of Judgments § 24 (1982) reads:

> (1) When a valid and final judgment . . . extinguishes the plaintiff's claim pursuant to the rules of merger or bar. . . . the claim extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction'. . . [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

> constituting an element of the minimum mandatory unit of litigation. That result must obtain whether or not the component constitutes either an independent cause of action by technical common-law definition or an independent claim which, in the abstract, is separately adjudicable.

William Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 293-94, 375 A.2d 675, 683-84 (App. Div.) *certif. denied* 75 N.J. 528, 384 A.2d 507 (1977); *Malaker*, 395 A.2d at 239. *See Tevis v. Tevis*, 79 N.J. 422, 400 A.2d 1189 (1979) (Suit for assault and battery barred after prior suit for divorce on grounds, *inter alia*, of physical abuse); *Ajamian v. Schlanger*, 14 N.J. 483, 103 A.2d 9, *cert. denied* 348 U.S. 835 (1954) (Suit for damages barred after suit for contract rescision based on some fraudulent representations); *cf. Alper Construction Co. v. Garavelli*, 655 S.W.2d 132 (Mo. Ct. App. 1983) (Suit for fraudulent inducement of contract barred following suit for quantum meruit).

Given this approach to claim preclusion, we can confidently predict that New Jersey would view the first count of plaintiffs' complaint in this action as but another aspect of the same controversy that had been at issue in the first lawsuit. The controversy at issue in both suits involves Exporting's alleged failure to post the security which it promised to provide in connection with a single commodities transaction. The entire controversy doctrine therefore bars a second action against the defendant in the first suit -- Exporting.[3] It does not necessarily follow, however, that the district

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3 Exporting's position in this litigation is not entirely clear. Although Exporting is a named defendant, and is represented by counsel in this appeal, plaintiffs at argument before this court stated that "Anthony Exporting Company, Incorporated, the defendant in the prior case, is not a defendant in the present case." In any event, plaintiffs are not free to sue Exporting a second time on the same controversy that was at issue in the the first suit.

court properly dismissed count one against the individual defendants who were not named in the first action, Corradetti, Coppersmith, and Bernstein.

In *Crispin v. Volkswagonwerk, A.G.*, 96 N.J. 336, 476 A.2d 250 (1984), the Supreme Court of New Jersey held that the entire controversy doctrine can bar a claim asserted against one who was not a party to the prior related proceeding.[4] It acknowledged, however, that this conclusion was inconsistent with a consistent and venerable line of New Jersey cases. As a result, the Supreme Court explicitly directed that the *Crispin* holding be applied only prospectively. Conversely, it decreed that with respect to controversies arising before the decision in *Crispin*, the entire controversy doctrine would not preclude a related claim against one not a party to the original proceeding. 476 A.2d at 254.

Because the plaintiffs' cause of action arose in 1980, long before *Crispin*, their suit is governed by the rule which prevailed before that decision. Accordingly, the applicable rule is that "a claim against a person who was not a party to the initial litigation is ordinarily not precluded from being subsequently litigated even if it is the same as or transactionally related to the claim which is the subject of the initial litigation." *Bates Marketing Associates, Inc., v. Lloyd's Electronics, Inc.*, 190 N.J. Super. 502, 464 A.2d 1142, 1144 (App. Div.), *certif. granted* 94 N.J. 583, 468 A.2d 222 (1983) (citations omitted); *Gilchrist, supra*; *see*, Comment, *supra*, 12 Seton Hall L. Rev at 279-82. Therefore,

> [If a] plaintiff has been successful in the first action and the judgment in his favor therein remains

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4 The Court did not adopt a per se rule: rather, it expressed its intent to proceed "on a step-by-step basis recognizing that the [entire controversy] doctrine is one of judicial fairness and will be invoked in that spirit." 476 A.2d at 253.

> unsatisfied, he is free to proceed against the other party whose responsibility to him for the harm presents a fact issue not foreclosed by reason of a prior adverse adjudication.

McFadden v. Turner, 159 N.J. Super. 360, 388 A.2d 244, 246 (1978.)[5]

In particular, "the recovery of a judgment, not satisfied, against the agent or servant does not bar a separate suit against the principal or master." *Moss v. Jones*, 93 N.J. Super. 179, 225 A.2d 369, 372 (App. Div. 1966). We are confident that New Jersey, in a pre-*Crispin* case, would apply the same principle when the first suit is against the principal and the second against its agents. Accordingly, the entire controversy doctrine, while constituting a bar to this second action against Exporting, does not prevent plaintiffs from seeking relief from Exporting's agents or principals. *See Gilchrist, supra*, (prior to *Crispin*, entire controversy doctrine not applicable when first suit was against employer for vicarious liability and second suit is against employee); *Gareeb v. Weinstein*, 161 N.J. Super. 1, 390 A.2d 706 (1978) (pre-*Crispin* doctrine does not apply to principal and agent).

Accordingly, we hold that the district court erred in dismissing the count one claims against Corradetti, Coppersmith, and Bernstein.

C. *PIERCING EXPORTING'S CORPORATE VEIL*

In count two, plaintiffs seek to pierce the corporate veil of Exporting. New Jersey law permits a court to ignore a corporation's separate entity in order to prevent it "from being used to defeat the ends of justice, to perpetuate fraud, to accomplish a crime, or

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5 Of course this does not abrogate the rule that a plaintiff is entitled to only one satisfaction for the same loss. *McFadden, supra*.

otherwise evade the law." *New Jersey State Department of Environmental Protection v. Ventron*, 94 N.J. 473, 468 A.2d 150, 164 (1983).[6] The subsidiary need not have been created with the intent to defraud, but if it is used to perpetrate a fraud, then the doctrine may apply. *Fortugno v. Hudson Manure Company*, 51 N.J. Super. 482, 144 A.2d 207 (App. Div. 1958).

Plaintiffs make the following allegations, among others, in support of their second count:

(1) Coppersmith, Bernstein and Corradetti are the beneficial owners of and control Anthony Associates, Inc. ("Associates"), Corradetti Enterprises, Inc. ("Corradetti, Inc."), Exporting, Memco Trading Co., Inc. ("Memco"), and R.A.M. Packaging ("R.A.M."), all of which are located at the same address.

(2) There is a "pervasive commingling" of the assets of these entities and they are run as a "single economic enterprise."

(3) Associates organized Exporting with capitalization of $2,500 and remains its sole stockholder.

(4) Coppersmith, Bernstein and Corradetti are the officers and directors of both Associates and Exporting and the managing partners of R.A.M.

(5) Exporting has never had any substantial business since its inception, except for the single wrongful transaction with the plaintiffs, and no significant assets were conveyed to it by the parent corporation.

(6) Exporting was grossly undercapitalized from its inception and has been "insolvent since the beginning."

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6 The entire controversy doctrine does not bar this suit to collect the judgment obtained in the first action. *Bates Marketing Associates, Inc. v. Lloyd's Electronics, Inc.*, 190 N.J. Super. 502, 464 A.2d 1142, 1144-45 (App. Div.), *certif. granted*, 94 N.J. 583, 468 A.2d 222 (1983).

(7) Exporting maintains no inventory, no books, no business records and no "viable bank checking account."

(8) R.A.M. paid for the payroll and benefits of Exporting and the other corporations as well as for their legal fees.

(9) Corradetti, Inc. was billed for all of the telephone and telex expenses of Exporting.

(10) The "directors and executives of . . . [Exporting] did not act independently in the interest of the subsidiary but took their orders from the parent corporation."

(11) Exporting was used by this single economic enterprise "as an instrument of fraud."

These allegations must be read in the context of the further allegation that Exporting, with less than $500 in total assets, entered into a $44,000,000 transaction with plaintiffs and of the fraud claims raised in count one against Corradetti, Coppersmith and Bernstein. When so read, we believe count two cannot be dismissed as failing to state a claim. Plaintiffs' complaint expressly alleges that Coppersmith, Bernstein and Corradetti, through their "single economic enterprise," used the corporate form of Exporting to defraud the plaintiffs. It then goes on to provide sufficient supporting details to prevent one from disregarding this allegation as merely conclusory pleading. Under these circumstances it was error to grant the defendants' motion to dismiss.

The district court's contrary conclusion was based largely on its willingness to overlook Exporting's allegedly inadequate capitalization. Because Exporting, a Domestic International Sales Corporation ("DISC") organized pursuant to 26 U.S.C. §§ 992-97, met the requirements for capitalization and organization set forth in 26 U.S.C. § 992 (a)(1)(C), the district court believed that its capitalization was

necessarily adequate. We are unwilling to hold, however, that Congress, when it established the minimum capitalization of a DISC, intended to immunize from liability anyone who utilized a minimally capitalized DISC to perpetrate a fraud. If it turns out that plaintiffs knew that they were dealing with a DISC, that fact will be relevant in determining whether the defendants are guilty of fraud, but that determination should be made in the context of all the facts and is not controlled by the single fact that Exporting's capitalization met the minimum permissible capitalization required for a DISC.

In re Farkar Co. and R.A. Hanson DISC, Ltd., 441 F.Supp. 841 (S.D.N.Y. 1977), *aff'd in part* 583 F.2d 68 (2d Cir. 1978), *modified* 604 F.2d 1 (2d Cir. 1978), is instructive on this issue. That case involved the question of whether a parent company was bound by an arbitration agreement signed by its DISC. The district court, applying Washington law, found that the DISC was so closely related to its parent as to justify treating them as one.[7]

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> Hanson, DISC is the barest shell, an alter ego of Hanson, Inc., whose existence as a barrier to the determination of Hanson, Inc.'s responsibility -- whatever it may be -- would constitute a "fraud" . . . Hanson, DISC is wholly owned by Hanson, Inc. Its officers and directors are literally identical to those of the parent. It has no employees: the personnel of Hanson, Inc. perform all of Hanson, DISC's functions. Hanson DISC has no inventory and no office. In sum, the DISC is nothing more than a "paper" sales subsidiary through which the parent conducts its export business; and even for that purpose it does not employ its own distinct sales force, but rather uses employees of the parent. To all but the IRS (which recognizes a distinction between the subsidiary and the parent for tax purposes only), Hanson, Inc., and Hanson DISC are identical.

441 F.Supp. at 845-46 (citations omitted).

The Second Circuit affirmed. It reserved the question of which body of law applied to this issue because it found that "under any body of applicable law the result would be the same, . . . [t]he corporate veil was so diaphanous that it did not even require piercing." 583 F.2d at 71.

We agree with the Second Circuit. The issue of whether the corporate veil of a DISC can be pierced is primarily a question of fact. Plaintiffs have alleged sufficient facts to state a claim and should be permitted to proceed with discovery to further develop the factual record.

Finally, the district court also concluded that plaintiffs were collaterally estopped from asserting their count two claims because they had litigated the veil piercing "issue in the context of their motion to amend the caption of the previous action." We find this reliance on principles of issue preclusion misplaced. The motion to amend was filed in May, 1983, over a year after entry of judgment in the first case. The district court refused to permit the amendment on the grounds that plaintiffs had been aware of the financial condition of Exporting prior to trial and that it would be improper "to add new defendants and then purportedly hold those defendants responsible for a verdict rendered in a lawsuit to which they had no opportunity to defend themselves." Accordingly, the district court had no occasion to address the issue of whether Exporting's corporate form should be disregarded.

We therefore reinstate plaintiffs' second count.

D. *CONSPIRACY*

The district court dismissed plaintiffs' conspiracy count on the ground that, because plaintiffs were precluded from asserting their fraud claims, there was

no tort upon which to predicate a conspiracy claim. Because we have reinstated the fraud claims, the conspiracy to defraud claim must be reinstated as well.[8]

A further word is in order with respect to defendants Bernard Weinstein and Philber Sales Corporation, t/a Bernie Weinstein. Both filed motions for summary judgment with their motions to dismiss and both claimed to have been granted summary judgment by the district court. This claim is unsupported by the record, however. We hold only that counts three and four state claims against these defendants upon which relief can be granted. Because the district court did not decide whether the affidavits supporting their alternative motion entitled them to summary judgment, we express no opinion on that issue.

E. *PUNITIVE DAMAGES*

Finally, because plaintiffs' substantive counts have been reinstated, it is necessary also to reinstate their claim for punitive and exemplary damages.

III.

The judgment below will be reversed and the case will be remanded for further proceedings consistent with this opinion.

---

8 Plaintiffs cannot sue Exporting on this count for the same reason they cannot sue Exporting on count one. *See supra*, n. 3.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5588

MENTSAGAN MELIKIAN and
KAMBIZ AFTASSI,
Appellants

vs.

ANTHONY CORRADETTI; MORRIS COPPERSMITH;
RUBIN BERNSTEIN; BERNARD WEINSTEN; as individuals
and in their corporate capacities, individually,
jointly, severally and in the alternative, and
CORRADETTI ENTERPRISES, INC., t/a ANTHONY SALES,
a New Jersey corporation; ANTHONY ASSOCIATES, INC.,
a New Jersey corporation; R.A.M. PACKAGING, a
New Jersey fictitious name; MEMCO TRADING CO., INC.,
a Pennsylvania corporation, authorized to do
business in New Jersey; PHILBER SALES CORPORATION,
t/a BERNIE WEINSTEIN, a New Jersey corporation and
ANTHONY EXPORTING CO., INC., jointly and severally

On Appeal from the United States District Court
for the District of New Jersey (Camden)
(D.C. Civil No. 84-03480)
District Judge: Stanley S. Brotman

Submitted Under Third Circuit Rule 12 (6)
December 14, 1989

Before: HUTCHINSON, COWEN and WEIS, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against the appellants.

ATTEST: By the Court

Sally Mrvos, Clerk
Dated: DEC. 21, 1989

CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5588

MENTSAGAN MELIKIAN and
KAMBIZ AFTASSI,

Appellants

v.

ANTHONY CORRADETTI; MORRIS COPPERSMITH;
RUBIN BERNSTEIN; BERNARD WEINSTEIN; as individuals
and in their corporate capacities, individually,
jointly, severally and in the alternative, and
CORRADETTI ENTERPRISES, INC., t/a ANTHONY SALES,
a New Jersey corporation; ANTHONY ASSOCIATES, INC.,
a New Jersey corporation; R.A.M. PACKAGING, a
New Jersey fictitious name; MEMCO TRADING CO., INC.,
a Pennsylvania corporation, authorized to do
business in New Jersey; PHILBER SALES CORPORATION,
t/a BERNIE WEINSTEIN, a New Jersey corporation and
ANTHONY EXPORTING CO., INC., jointly and severally

SUR PETITION FOR HEARING

BEFORE: HIGGINBOTHAM, *Chief Judge;* SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and WEIS,* *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

* As to panel rehearing only.

By the Court,

_____

Circuit Judge

Dated: JAN. 24, 1990

IN THE
SUPREME COURT OF THE UNITED STATES

No. 89-1964 October Term, 1989

MENATSAGAN MELIKIAN and
KAMBIZ AFTASSI,
Petitioners

v.

ANTHONY CORRADETTI; MORRIS COPPERSMITH;
RUBIN BERNSTEIN; BERNARD WEINSTEIN;
CORRADETTI ENTERPRISES, INC., t/a
ANTHONY SALES; ANTHONY ASSOCIATES, INC.;
R.A.M. PACKAGING; MEMCO TRADING CO., INC.;
PHILBER SALES CORPORATION, t/a BERNIE
WEINSTEIN; ANTHONY EXPORTING CO., INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly affirmed the District Court's dismissal of the complaint.

Whether the District Court Judge properly refused to recuse himself.

PARTIES

Petitioners are plaintiffs below. Menatsagan Melikian is appearing *pro se.* Although Kambiz Aftassi is listed as a petitioner, he has not actually joined in the petition by appearing either *pro se* or through counsel. Further, the petition also improperly identifies the Honorable Stanley S. Brotman, U.S.D.J., as a respondent even though he was not named as a party to these proceedings below.

Respondents are Anthony Corradetti; Morris Coppersmith (deceased); Rubin Bernstein; Bernard Weinstein; Corradetti Enterprises, Inc. t/a Anthony Sales; Anthony Associates, Inc.; R.A.M. Packaging; Memco Trading Co.; Philber Sales Corporation t/a Bernie Weinstein; and Anthony Exporting Co., Inc.[1] The corporate defendants are not subsidiaries of nor do they have parent companies who are not parties named herein.

COUNTERSTATEMENT OF THE CASE

Respondents accept the first two paragraphs of petitioner's statement of the case and add the following.

---

1. This brief is filed by counsel representing Anthony Exporting Co., Inc., Anthony Associates, Inc., Morris Coppersmith, Rubin Bernstein, and Memco Trading Co., Inc. Respondents Anthony Corradetti, Corradetti Enterprises, Inc., t/a Anthony Sales and R.A.M. Packaging, through their respective counsel, also join in this brief. Respondants Bernard Weinstein and Philber Sales Corporation t/a Bernie Weinstein will file a separate brief through their own counsel.

In a decision published at 791 F.2d 274 (3rd Cir. 1986) (Pet. App. A), the Court of Appeals reversed the trial court's order dismissing the complaint and remanded the matter back to the trial court.[2]

The relevant history of the case in the District Court after the remand is particularized by Magistrate Jerome B. Simandle in his Report and Recommendation filed June 1, 1989 (Pet. App.).[3] In sum, Melikian, after filing notice that he was representing himself *pro se*, made several attempts to have Judge Brotman recuse himself and simultaneously refused to obey numerous orders of the court. On two separate occasions, Melikian, and Aftassi, through his then-counsel, Daniel B. Zonies, Esquire, unsuccessfully sought interlocutory review of Judge Stanley S. Brotman's orders denying their requests for his recusal.

As Magistrate Simandle's Report and Recommendation outlines in greater detail, Melikian and Aftassi's refusal to obey scheduling and discovery orders issued by the court culminated in their refusal to participate in the pretrial conference procedure just prior to the trial which was scheduled for June 5, 1989 (Pet. App. , Report pp. 5-6, 12). On May 15, 1989, Melikian, in a letter to Judge Brotman, again demanded that the Judge recuse himself and stated that he would "defy the court's

---

2. The trial court's dismissal of the Complaint as against Anthony Exporting Co., Inc., was affirmed, however.

3. Petitioners have failed to comply with the directive of the Clerk of this Court to supplement their appendix with Magistrate Simandle's Report and Recommendation ("Report"), Judge Brotman's Opinion, filed June 23, 1989, accepting the Report ("Opinion"), and Judge Brotman's Order dismissing the complaint with prejudice filed the same date ("Order"). Consequently the Clerk has directed Respondents to file one photocopy of these papers with the Court, and to refer to their page numbers when citing to specific pages of those documents.

orders" by refusing to participate in any further discovery proceedings, the final pretrial conference or the trial (Pet. App. , Report pp. 10-11).

As promised, Melikian refused to attend the pretrail conference on May 22, 1989. Although Mr. Zonies did appear, he represented that he had been instructed by his client, Aftassi, not to participate and stood "mute" (Pet. App. , Report p. 12).

As a result of Melikian and Aftassi's willful defiance of the court's orders to proceed, Magistrate Simandle filed a Report and Recommendation with Judge Brotman which carefully recounted petitioners' transgressions and the trial court's efforts to deal fairly with petitioners. The Report ultimately recommended that Judge Brotman dismiss the complaint with prejudice (Pet. App. , Report p. 31). Although the Report expressly advised petitioners' of the right to file an objection to the Recommendation (Pet. App. , Report pp. 31-33), neither Melikian nor Aftassi chose to do so (Pet. App. , Opinion p. 4).

Melikian refused to appear at the trial on June 5, 1989, and again Mr. Zonies represented to the court that Aftassi had instructed him not to proceed with the case. Judge Brotman then issued an Opinion and an Order, both filed June 23, 1989, accepting the Report and Recommendation of Magistrate Simandle and dismissing the complaint with prejudice (Pet. App.).

Having obtained a final judgment through the dismissal of their action, petitioners then appealed to the United States Court of Appeals for the Third Circuit (Case No. 89-5588). There, they argued that Judge Brotman improperly failed to recuse himself as a result of the Third Circuit's May 28, 1986 opinion reversing the order granting defendants' initial motion to dismiss the complaint and remanding the matter back to the trial court.

The three judge panel of the Third Circuit issued a Judgment Order dated December 21, 1989 affirming the

judgment of the District Court dismissing the complaint (Pet. App. B). Petitioners' request for a hearing *in banc* was denied on January 23, 1990 (Pet. App. C).

SUMMARY OF ARGUMENT

The Court of Appeals did not err in affirming the judgment of the district court dismissing the complaint, based upon the findings of fact and law set out in the Report and Recommendation of Magistrate Simandle, to which petitioners never objected. As the Report shows, the trial court gave petitioners every opportunity to cure their repeated failures to abide by court orders, and was left with no choice but to dismiss the case in view of petitioners' avowed defiance of the trial court's orders.

Moreover, there was never any basis for Judge Brotman to have recused himself. The only reason petitioners articulate in support of that claim was that the Third Circuit reversed and remanded Judge Brotman's initial order granting defendants' motion to dismiss the complaint; the Third Circuit's opinion clearly did not create any grounds for Judge Brotman to recuse himself.

ARGUMENT

Initially, it is apparent that there are no issues present which would justify granting the petition for writ of certiorari. Rule 10 of this Court sets forth the general reasons which this Court will consider in deciding whether to grant a petition for writ of certiorari. In a case from the United States Court of Appeals, this Court looks to whether the decision rendered by the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter, or whether the Court of Appeals has decided a federal question in conflict with a state court of last resort, or whether the Court of Appeals has so far departed, or affirmed such a departure by a lower court, from the accepted and usual course of

judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Sup.Ct.R.10.1(a). Although the Rule advises that these factors are not exhaustive, the issues raised by the petition do not call any of the factors highlighted by the Rule into play nor do they merit further consideration by this Court on any other grounds.

A. The Court of Appeals Correctly Affirmed the Trial Court's Dismissal of the Complaint.

The petitioners' long, willful and determined journey to the point where the trial court had no alternative but to dismiss their complaint was summarized above. However, since the trial court's very justification for its action lies with the cumulative conduct of the petitioners, a full appreciation of the problems confronting the trial court cannot be gained without reviewing the Report and Recommendation issued by Magistrate Simandle. For the sake of brevity, those findings will not be repeated at length here.

The trial Court may exercise its discretion and select dismissal of the matter as the appropriate sanction after considering all relevant circumstances. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The trial court very carefully balanced the factors set forth in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3rd Cir. 1984) in determining that it was necessary to dismiss petitioners' case:

> (1) the extent of the party's personal responsibility; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad* faith; (5) the effectiveness of sanctions other than dismissal which entails an analysis of

> *alternative sanctions* and (6) the meritoriousness of the claim or defense. [emphasis in original]

Petitioners' refusal to go forward with the proceedings in the trial court, assertedly on the basis that Judge Brotman improperly refused to recuse himself was nothing but a bold attempt to manipulate judicial proceedings in order to reach the Third Circuit Court of Appeals, in anticipation of that court holding that Judge Brotman should have recused himself. It was, as Magistrate Simandle concluded, "the product of calculation and intentionality, and it is not done by inadvertence or neglect; the conduct is of sufficient culpability to fully warrant dismissal of plaintiffs' case." (Pet. App. , Report p. 24). As a result, Magistrate Simandle recommended that petitioners' case be dismissed pursuant to Fed.R.Civ.P. 16(f) and 37(b)(2)(C)[4]. Petitioners never objected to the Report and Recommendation.

The only grounds on which petitioners rely to seek this Court's review is their claim that Judge Brotman improperly failed to recuse himself.

B. Judge Brotman Did Not Err in Refusing to Recuse Himself.

Petitioners argue that the Third Circuit's decision in *Melikian v. Corradetti*, 791 F.2d 274 (3rd Cir. 1986) reversing Judge Brotman's Order granting defendants' Motion to dismiss the Complaint (except as to defendant Anthony Exporting Co., Inc. on which point Judge Brotman was affirmed) required that he recuse himself from the case following remand. That proposition is plainly without merit. Clearly, an inference that a judge's impartiality might reasonably be questioned is not raised by the fact that a judge made a judicial decision which is deemed erroneous by a higher court.

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4. The pertinent language is quoted in the Report and Recommendation at Pet. App. , Report, pp. 14-16.

See United States v. Hollis, 718 F.2d 277 (8th Cir. 1983) *cert. denied* 465 U.S. 1036 (1984); and *Mayberry v. Maroney* 558 F.2d 1159 (3rd Cir. 1977)

Indeed, where grounds for recusal do not exist, a judge is obligated *not* to recuse himself. *Suson v. Zenith Radio Corp.,* 763 F.2d 304 (7th Cir. 1985). Plainly, Judge Brotman correctly denied petitioners' demands for recusal.

Conclusion

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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Dated: July 30, 1990

No. 89-1964

IN THE
Supreme Court of the United States
October Term, 1990

MENATSAGAN MELIKIAN and KAMBIZ AFTASSI,
Petitioners,

vs.

ANTHONY CORRADETTI; MORRIS COPPERSMITH; RUBIN BERNSTEIN; BERNARD WEINSTEIN; CORRADETTI ENTERPRISES, INC., t/a ANTHONY SALES; ANTHONY ASSOCIATES, INC.; R.A.M. PACKAGING; MEMCO TRADING CO., INC.; PHILBER SALES CORPORATION, t/a BERNIE WEINSTEIN; ANTHONY EXPORTING CO., INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
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MENATSAGAN MELIKIAN and KAMBIZ AFTASSI,
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vs.

ANTHONY CORRADETTI; MORRIS COPPERSMITH; RUBIN BERNSTEIN; BERNARD WEINSTEIN; CORRADETTI ENTERPRISES, INC., t/a ANTHONY SALES; ANTHONY ASSOCIATES, INC.; R.A.M. PACKAGING; MEMCO TRADING CO., INC.; PHILBER SALES CORPORATION, t/a BERNIE WEINSTEIN; ANTHONY EXPORTING CO., INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTION

This Brief is submitted on behalf of respondents Bernard Weinstein and Philber Sales Corp. in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

QUESTION PRESENTED

Whether a prior decision of the United States District Court judge adverse to the petitioners constituted evidence of bias sufficient to require recusal pursuant to 28 U.S.C. 455(a).

COUNTERSTATEMENT OF THE CASE

Early in the history of this litigation, on February 13, 1985, United States District Judge Stanley S. Brotman granted a motion by respondents to dismiss the complaint for failure to state a cause of action. On May 28, 1986, Judge Brotman's order of dismissal was reversed by the U.S. Court of Appeals for the Third Circuit which also remanded the case to the district court to enable further discovery. *See,* Petitioners' Appendix A.

Four years later respondents sought dismissal on different grounds pursuant to Fed.R.Civ.P., Rule 37(b)(2). The motion sought to dismiss the complaint because of petitioners' repeated failure to provide discovery to respondents and the petitioners' refusal to obey three orders of the district court directing that the subpoenaed discovery be produced. On June 1, 1989, the United States Magistrate issued a Report and Recommendation advising Judge Brotman that the complaint should be dismissed for the reasons advanced in respondents' motion. *See,* Report and Recommendation, dated June 1, 1989, as filed by counsel for co-respondents.*

---

*By letter of June 21, 1990, the Clerk of the Supreme Court of the United States advised petitioners that they had failed to include in their Appendix the Report and Recommendation of the United States Magistrate, dated June 1, 1989, and the opinion and order of Judge Brotman, dated June 22, 1989. The Clerk requested that petitioners submit such documents with a supplemental appendix, but petitioners have not so responded. At the request of the Clerk, Archer & Greiner, counsel for co-respondents, has filed the missing documents with the Court and they are so referred to in this instant brief.

On June 22, 1989, Judge Brotman adopted the Report and Recommendation and dismissed the complaint. In his opinion of that date, Judge Brotman noted that the petitioners had neither objected to nor disputed the Magistrate's findings. Judge Brotman further found that petitioners had repeatedly and deliberately ignored the court's discovery orders. *See,* Order and Opinion of U.S. District Judge Stanley S. Brotman, dated June 22, 1989, as filed by counsel for co-respondents.

Petitioners appealed to the U.S. Court of Appeals for the Third Circuit. Again, petitioners did not dispute the merits of the dismissal. Petitioners argued only that Judge Brotman should have recused himself because his original dismissal of the complaint in February 1985 evidenced bias against petitioners. Petitioners asserted that Judge Brotman thereby had no authority to issue the June 22, 1989 order of dismissal. On December 21, 1989 the Court of Appeals unanimously denied the appeal and affirmed the judgment of the district court. *See,* Petitioners' Appendix B. The Court of Appeals denied petitioners' application for rehearing on January 24, 1990. *See,* Petitioners' Appendix C.

This Petition followed.

SUMMARY OF ARGUMENT

The Third Circuit Court of Appeals correctly affirmed the dismissal by the district court. The complaint had been dismissed because of the petitioners' repeated and willful refusal to provide discovery as three times ordered by the district court. By refusing to hold that Judge Brotman should have recused himself, the Court of Appeals acted in a manner consistent with the universal holding that a prior adverse ruling alone is an insufficient basis on

which to permit recusal of a U.S. District Court judge. The affirmance is also consistent with this Court's decisions in *United States v. Grinnell Corporation,* 384 U.S. 563 (1966), and *Berger v. United States,* 255 U.S. 22 (1921), which have never been subject to legislative or judicial criticism or been seen to require modification.

ARGUMENT

The sole issue raised by petitioners is that Judge Brotman improperly refused to recuse himself following the Third Circuit's reversal of his February 1985 order of dismissal and thereby did not have the authority to grant the later order of dismissal on June 22, 1989.

Judge Brotman, however, was correct. It is universally accepted doctrine that a district judge may not recuse himself solely on the basis of a prior adverse ruling, even where later reversed on appeal.

In *United States v. Grinnell Corporation, supra,* this Court held that a prior determination on the merits is wholly insufficient as a basis for seeking recusal. 384 U.S. at 583. The *Grinnell* Court held that recusal may be employed only where there is a source of bias extrinsic to the litigation. Where the alleged bias relates to information learned by the judge in the course of the action, there is no basis for recusal. *Grinnell* states:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* at 583.

The *Grinnell* standard has been uniformly interpreted by the circuits to preclude recusal in the case of prior

adverse rulings. See, e.g., *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1987); *United States v. Giorgi*, 840 F.2d 1022 (1st Cir. 1988); *In re Little Rock School District*, 839 F.2d 1296 (8th Cir. 1988); *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287 (D.C. Cir. 1988); *Cippollone v. Liggett Group, Inc.*, 822 F.2d 335 (3d Cir. 1987); *United States v. Daly*, 564 F.2d 645 (2d Cir. 1977); *United States v. Irwin*, 561 F.2d 198 (10th Cir. 1977).

Grinnell itself is based upon this Court's earlier decision in *Berger v. United States, supra,* where the Court held that recusal may only be obtained where the alleged bias is based upon something "other than rulings in the case." *Id.* at 31. The Court in *Berger* noted with approval its earlier dictum that the recusal statute was "never intended to enable a discontented litigant to oust a judge because of adverse rulings." *Id., quoting, Ex Parte American Steel Barrel Co.*, 230 U.S. 35 (1913).

The affirmance below was thus well within the scope of *Grinnell* and *Berger.* Petitioners offered no evidence of the alleged bias of the district judge other than the mere fact that Judge Brotman had ruled against them in February 1985. Such an evidentiary showing has never been accepted as a sufficient basis on which to permit recusal under 28 U.S.C. 455(a).

Grinnell and *Berger* both reject the argument raised here by petitioners. The Court's decisions in *Grinnell* and *Berger* have been universally understood by the circuits to preclude recusal solely on the basis of a prior adverse ruling. Since *Grinnell* and *Berger* have been correctly applied by the circuits, there is no need for yet another consideration of the issue by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents
Bernard Weinstein and
Phillips Sales Corp.

Dated: July 30, 1990